



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

DARYL ARMSTEAD,

Petitioner,

v.

S. WRIGHT, et al.,

Respondent.

No. CV 07-2246-CJC (AGR)

ORDER ADOPTING MAGISTRATE  
JUDGE'S REPORT AND  
RECOMMENDATION

Pursuant 28 U.S.C. § 636, the Court has reviewed the entire file de novo, including the Petition, the Magistrate Judge's Report and Recommendation, the Objections to the Report and Recommendation, and all records in the file. Having made a de novo determination, the Court agrees with the recommendation of the Magistrate Judge.

IT IS ORDERED that Defendant's motion to dismiss the Second Amended Complaint is denied.

DATED: May 30, 2008

  
CORMAC J. CARNEY  
UNITED STATES DISTRICT JUDGE

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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 DARYL ARMSTEAD,

12 Plaintiff,

13 v.

14 S. WRIGHT, et al.,

15 Defendants.  
16  
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NO. CV 07-2246-CJC (AGR)

REPORT AND  
RECOMMENDATION OF UNITED  
STATES MAGISTRATE JUDGE

18  
19 The Court submits this Report and Recommendation to the Honorable  
20 Cormac J. Carney, United States District Judge, pursuant to 28 U.S.C. § 636 and  
21 General Order No. 05-07 of the United States District Court for the Central District  
22 of California. For the reasons set forth below, the Magistrate Judge recommends  
23 that the motion to dismiss the Second Amended Complaint be denied.

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I.

**SUMMARY OF PROCEEDINGS**

On April 4, 2007, Plaintiff, who is incarcerated at Chuckawalla Valley State Penitentiary, filed a complaint pursuant to 42 U.S.C. § 1983. On July 11, 2007, Plaintiff filed a First Amended Complaint. On January 8, 2008, in response to a defense motion, the Court dismissed the complaint with leave to amend. On January 25, 2008, Plaintiff filed a Second Amended Complaint ("SAC") in which he stated a retaliation claim. On February 25, 2008, Defendants filed a motion to dismiss ("MTD"). On March 20, 2008, Plaintiff filed an opposition. On April 8, 2008, Defendants filed a reply.

The matter is now under submission.

II.

**ALLEGATIONS IN SECOND AMENDED COMPLAINT**

Plaintiff names Defendants Moti Raghunath, Correctional Food Manager; and Curtis Wells, Assistant Food Manager. Both are sued in their individual capacities.

The prison served Plaintiff and other inmates refried beans containing lard, a pork derivative. On January 22, 2006, Plaintiff submitted a grievance to prison authorities regarding the refried beans alleging a violation of his First Amendment rights to practice religion. On or shortly before February 16, 2006, Raghunath and Wells retaliated against Plaintiff for filing the grievance by removing two food items normally offered as alternate entrees.

Plaintiff seeks unspecified compensatory and punitive damages.

III.

**STANDARD OF REVIEW**

"To state a claim for relief under section 1983, [a plaintiff] must plead two essential elements: 1) that the Defendants acted under color of state law; and 2) that the Defendants caused [the plaintiff] to be deprived of a right secured by the

1 Constitution and laws of the United States.” *Johnson v. Knowles*, 113 F.3d 1114,  
2 1117 (9th Cir.) (citation omitted), *cert. denied*, 522 U.S. 996 (1997).

3 A court may dismiss a claim upon a motion of the defendants or on its own  
4 pursuant to Fed. R. Civ. P. 12(b)(6) for “failure to state a claim upon which relief  
5 can be granted.” *Wong v. Bell*, 642 F.2d 359, 361-62 (9th Cir. 1981). “Fed. R.  
6 Civ. P. 8(a)(2) requires only a short and plain statement of the claim showing that  
7 the pleader is entitled to relief. Specific facts are not necessary; the statement  
8 need only give the defendant fair notice of what the . . . claim is and the grounds  
9 upon which it rests.” *Erickson v. Pardus*, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d  
10 1081 (2007) (per curiam) (citations and internal quotation marks omitted).  
11 “Factual allegations must be enough to raise a right to relief above the  
12 speculative level.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 167  
13 L.Ed. 2d 929 (2007).

14 In reviewing a complaint under this standard, the court must accept as true  
15 the allegations of the complaint and construe the pleading in the light most  
16 favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct.  
17 1843, 23 L. Ed. 2d 404 (1969). However, the “court is not required to accept  
18 legal conclusions cast in the form of factual allegations if those conclusions  
19 cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness*  
20 *Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citations omitted). •

21 In a pro se civil rights case, the complaint must be construed liberally to  
22 afford the plaintiff the benefit of any doubt. *Karim-Panahi v. Los Angeles Police*  
23 *Dept.*, 839 F.2d 621, 623 (9th Cir. 1988); see *Erickson*, 127 S. Ct. at 2200 (“[A]  
24 pro se complaint, however, inartfully pleaded, must be held to less stringent  
25 standards than formal pleadings drafted by lawyers”) (citation and internal  
26 quotation marks omitted). Before dismissing a pro se civil rights complaint for  
27 failure to state a claim, the plaintiff should be given a statement of the complaint's  
28 deficiencies and an opportunity to cure them unless it is absolutely clear the

deficiencies cannot be cured by amendment. *Karim-Panahi*, 839 F.2d at 623-24; see also *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

#### IV.

### DISCUSSION

#### **A. Retaliation Standard**

Prisoners have a First Amendment right to file prison grievances. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005). Retaliatory action taken by prison officials against a prisoner for having exercised this right violates the Constitution. *Id.* A retaliation claim has “five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.” *Id.* at 567-68 (citation and footnote omitted).

#### **B. Analysis**

##### **1. Retaliatory Act**

Defendants first contend that Plaintiff has not adequately pled the first element. (MTD at 6.) In support, Defendants argue that Plaintiff’s allegation that the entrees were removed because of his grievance is conclusory. (*Id.*)

Plaintiff alleges he filed his grievance on January 22, 2006. (SAC at Claim #1 at 1.) He further alleges that “[s]hortly before or on February 16, 2006,” the alternate entrees were removed. (*Id.*); see *Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995) (“[T]iming can properly be considered as circumstantial evidence of retaliatory intent”) (citation omitted).<sup>1</sup> Defendants’ argument that these allegations are too conclusory is without merit. See *Erickson*, 127 S. Ct. at 2200

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<sup>1</sup> Defendants’ argument that Plaintiff “admits” that the food staff told him that the entree removal wasn’t done in retaliation is misguided. (MTD at 6.) Plaintiff *acknowledges* what he has been told. That acknowledgment is not an *admission* as to the truth of the statement.

1 (“The case cannot, however, be dismissed on the ground that petitioner’s  
2 allegations of harm were too conclusory to put these matters in issue.”).

3 Defendant’s argument that Plaintiff has failed to plead the absence of a  
4 legitimate correctional goal is also meritless. (MTD at 5.) Plaintiff must allege  
5 that the “retaliatory action did not advance legitimate goals of the correctional  
6 institution or was not tailored narrowly enough to achieve such goals.” *Rizzo v.*  
7 *Dawson*, 778 F.2d 527, 532 (9th Cir. 1985) (citation omitted); *see Pratt*, 65 F.3d  
8 at 806 (“The plaintiff bears the burden of pleading and proving the absence of  
9 legitimate correctional goals for the conduct of which he complains.”). Dismissal  
10 may be “warranted if there was no factual support for the allegations or the  
11 factual support was contradicted by facts that the court could notice or that were  
12 apparent in the record.” *Rizzo*, 778 F.2d at 532 n.4.

13 Here, Plaintiff alleges that Defendants’ conduct was done in retaliation and  
14 not to advance legitimate penological goals, and was not narrowly tailored to  
15 achieve any legitimate goals. (SAC at 5.) Plaintiff alleges that Defendants’  
16 asserted justification for the removal of entree items is a pretext and  
17 contradictory. (*Id.*) Plaintiff’s allegation is sufficient to defeat a motion to dismiss.  
18 *Rizzo*, 778 F.2d at 532 & n.4 (allegation that defendants’ actions were retaliatory  
19 and arbitrary is sufficient on a motion to dismiss); *see Rhodes*, 408 F.3d at 567 &  
20 n.11.

## 21 2. Causation

22 Defendants argue that Plaintiff has not alleged any factual connection  
23 between Defendants and the removal of the entrees. (MTD at 7.) However,  
24 Plaintiff sufficiently alleged that Defendants, the food manager and the assistant  
25 food manager of the prison, removed the entrees from the menu. (SAC at Claim  
26 #1.) Although Defendants argue that removal of the entrees was done based on  
27 the state mandated menu (MTD at 8), Plaintiff alleges that the removal of entrees  
28 was in retaliation for his exercise of First Amendment rights. Plaintiff further

1 alleges that Defendants' justification is a pretext. According to the SAC, fish and  
2 boca burgers were on the prison menu after the date of the state mandated  
3 menu, and were returned to the prison menu after six months. (SAC at 5 and  
4 subsequent page; SAC, Claim # 1 at ¶¶ 7-10; SAC Exh. F.) Plaintiff's allegations  
5 are sufficient to withstand a motion to dismiss. See *Rhodes*, 408 F.3d at 568  
6 (allegation that threat of retaliatory transfer was made because inmate exercised  
7 First Amendment rights is sufficient).

### 8 3. Injury

9 Defendants' contention that Plaintiff is not entitled to relief because he fails  
10 to allege any "compensable injury" is without merit. (MTD at 9.) Plaintiff alleges  
11 injury from the retaliatory removal of certain entrees from the prison menu for  
12 apparently six months in response to his exercise of First Amendment rights.  
13 (SAC at 5 and subsequent pages.) Plaintiff has sufficiently alleged injury. See  
14 *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997) (allegation of retaliatory ten-  
15 day confinement and loss of television in response to grievances sufficiently  
16 alleges injury), *cert. denied*, 524 U.S. 936 (1998); see also *Oliver v. Keller*, 289  
17 F.3d 623, 629-30 (9th Cir. 2002) (nominal damages, even if not expressly  
18 requested, compensatory and punitive damages for violation of constitutional  
19 rights not barred by 42 U.S.C. § 1997e(e)); *Cannell v. Lightner*, 143 F.3d 1210,  
20 1213 (9th Cir. 1998) ("The deprivation of First Amendment rights entitles a  
21 plaintiff to judicial relief wholly aside from any physical injury he can show, or any  
22 mental or emotional injury he may have incurred.").

### 23 4. Punitive Damages

24 Defendants also contend that Plaintiff has insufficiently pled any  
25 entitlement to punitive damages. (MTD at 10.) A plaintiff may seek punitive  
26 damages when an official's "conduct is shown to be motivated by evil motive or  
27 intent, or when it involves reckless or callous indifference to the federally  
28 protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 75



1 L. Ed. 2d 632 (1983); *Dang v. Cross*, 422 F.3d 800, 809-10 (9th Cir. 2005). At  
 2 this stage of the proceedings, Plaintiff has sufficiently stated a claim for punitive  
 3 damages. *Cf. Dubner v. City & County of San Francisco*, 266 F.3d 959, 969 (9th  
 4 Cir. 2001) (insufficient evidence to support allegation of punitive damages on  
 5 summary judgment).

### 6 5. Qualified Immunity

7 A motion to dismiss on qualified immunity grounds "puts the court in the  
 8 difficult position of deciding 'far-reaching constitutional questions on a nonexistent  
 9 factual record.'" *Hydrick v. Hunter*, 500 F.3d 978, 985 (9th Cir. 2007) (citation  
 10 omitted). Here, Plaintiff alleges retaliation for exercising his right to file  
 11 grievances in violation of the First Amendment. *Bradley v. Hall*, 64 F.3d 1276,  
 12 1279 (9th Cir. 1995) (filing grievances is protected by First Amendment). "[T]he  
 13 prohibition against retaliatory punishment is 'clearly established law' in the Ninth  
 14 Circuit, for qualified immunity purposes." *Hydrick*, 500 F.3d at 991 (citation  
 15 omitted). Where, as here, a plaintiff may be able to prove, consistent with his  
 16 allegations, that he was punished in retaliation for exercising his First Amendment  
 17 right to file grievances, his claim should not be dismissed at the Fed. R. Civ. P.  
 18 12(b)(6) stage. *Id.*

### 19 V.

### 20 RECOMMENDATION

21 For the reasons discussed above, it is recommended that the District Court  
 22 issue an Order (1) adopting this Report and Recommendation; and (2) directing  
 23 that Defendants' motion to dismiss the Second Amended Complaint be denied.  
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25  
 26 DATED: April 29, 2008

  
 ALICIA G. ROSENBERG  
 United States Magistrate Judge



NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.